IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MARCOS TELLEZ POBLETE, Petitioner.	2 CA-CR 2007-0024-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20040954

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By Scott A. Martin
Tucson
Attorneys for Petitioner

H O W A R D, Presiding Judge.

¶1 A jury found petitioner Marcos Poblete guilty of two counts each of aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with an alcohol concentration of .08 or greater, one each with a suspended driver's license and one each with two or more prior DUI convictions or offenses. At the time set for trial on the state's allegation that he had three prior historical felony convictions, the parties stipulated that Poblete had one prior conviction and that he should receive aggravated sentences of six years in prison. The trial court accepted the stipulation and sentenced him to concurrent,

aggravated prison terms of six years. Poblete filed a notice of appeal but later voluntarily dismissed the appeal. The trial court granted Poblete's request to file a delayed notice of post-conviction relief but denied relief on his subsequent post-conviction petition, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. This petition for review followed. We review for an abuse of discretion a trial court's ruling on a petition for post-conviction relief. *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001). We find no abuse here.

¶2 In his post-conviction petition, Poblete argued the blood alcohol test results should not have been admitted because his blood samples had been drawn by a law enforcement officer in violation of his constitutional rights and his trial counsel was ineffective by failing to move to suppress the test results. The trial court found the first issue precluded because it had been raisable on appeal but addressed the issue on the merits as well, ruling that *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966), did not apply because Poblete had consented to the officer's drawing his blood samples. The court found the ineffective assistance claim precluded because it could have been raised on appeal but also addressed the issue on the merits, ruling that any motion to suppress would have been denied because Poblete had consented to the blood draw.

¶3 The bulk of Poblete's argument on review addresses the trial court's conclusion that the blood test results were properly admitted at trial because Poblete consented to have his blood drawn by the law enforcement officer. He argues that his consent was not dispositive of the issue and that his constitutional rights were violated by the law enforcement officer's drawing his blood. We do not address these issues. The trial

court correctly found the issues precluded because Poblete did not raise them on appeal, having voluntarily dismissed his appeal. *See* Ariz. R. Crim. P. 32.2(a)(1) and (3).

¶4 Accordingly, the only issue properly before us is Poblete's claim that trial counsel was ineffective by failing to move to suppress the blood test results.[1] To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional standards and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064-65 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to establish one requirement, a court need not consider the other. *See State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992).

¶5 We agree with the trial court that Poblete failed to state a colorable claim that counsel was ineffective. Poblete challenges the trial court's ruling that any motion to suppress the blood test results would have been denied because he consented to have his blood drawn. Relying on *Mack v. Cruikshank*, 196 Ariz. 541, 2 P.3d 100 (App. 1999), he argues his consent could not have been freely and voluntarily given because he had no right to object under Arizona's implied consent statute. *See* A.R.S. § 28-1321(A). But, Poblete attached to his post-conviction petition the blood test report form showing he expressly consented to having his blood drawn; his signature appears on the form.

¶6 In any event, considering the state of the case law at the time Poblete was tried, we agree with the trial court that any motion to suppress the blood test results would

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[1]We note the trial court incorrectly found this claim precluded, ruling Poblete could have raised it on appeal but did not. Our supreme court has expressly prohibited appellate courts from addressing ineffective assistance of counsel claims on appeal. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

have been denied. At that time, Division One of this court had held a person trained as a phlebotomist is qualified under A.R.S. § 28-1388 to draw a DUI suspect's blood sample without being supervised by licensed medical personnel. *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, ¶¶ 1-2, 30 P.3d 649, 651 (App. 2001). The state attached to its response to Poblete's post-conviction petition a certificate showing the deputy who drew Poblete's blood sample had completed a course in phlebotomy and a document showing the course he completed had been approved by the Arizona Peace Officer Standards and Training Board. Poblete did not attach to his petition below an expert's affidavit avowing that counsel's performance fell below acceptable standards. Finally, although this court's decision in *State v. May*, 210 Ariz. 452, 112 P.3d 39 (App. 2005), was not issued until over six months after Poblete's sentencing, *May* precludes his substantive claim and demonstrates Poblete was not prejudiced by his counsel's failure to raise the issue.[2] Accordingly, Poblete failed to show counsel was ineffective by failing to move to suppress the blood test results.

¶7 Finding no abuse of discretion in the trial court's denial of post-conviction relief, we grant review, but deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

[2]We decline Poblete's request that we overturn *May*.

GARYE L. VÁSQUEZ, Judge